

March 25, 1941.

THE SECRETARY OF AGRICULTURE.

MY DEAR MR. SECRETARY:

The Acting Secretary of Agriculture, in his letter of February 5, requested my opinion "whether the Secretary of Agriculture, in taking disciplinary action against an employee of this Department on account of the employee's misconduct, can properly require the employee to reimburse the Government for a payment made by the Government to a private person for property damage resulting from the employee's negligence."

By way of illustration he cited the following case: An employee making an official trip in a Government car became intoxicated and collided with a privately owned vehicle. The employee accepted complete responsibility for the collision and voluntarily paid the cost of repairing the Government-owned vehicle. A claim for the damage of the privately owned vehicle, amounting to approximately \$125, was submitted to the Department and allowed under the provisions of the act of December 28, 1922, c. 17, 42 Stat. 1066 (U. S. C., title 31, secs. 215-217). Funds for this claim were appropriated by the Congress and payment was duly made. As a disciplinary measure the employee was required to take leave without pay for 1 month and was placed on probation for a year. It is further stated that the question has now arisen whether the Secretary of Agriculture can also require the employee to reimburse the Government in the amount of \$125.

In the absence of statutory authority, express or implied, an officer or employee of the Government may not be administratively deprived of his lawful compensation. Speaking on this subject in *Corcoran v. United States*, 38 Ct. Cls. 341, 345, the court said:

"Two things are essential to deprive an officer of his statutory compensation: The first is that the power so to do must be lodged, directly or by necessary implication, in some official hands * * *."

See also *Smith v. Jackson*, 246 U. S. 388; *McCarl v. Cox*, 8F. (2d) 669, Cert. denied, 270 U. S. 652; *McCarl v. Pence*, 18F. (2d) 809; 34 Op.A.G.517.

The act of December 28, 1922, under which the claim was adjusted and reported to the Congress does not provide for reimbursement by the employee, and no statute charges you with collecting the amount from him. If it were to be attempted the employee would, I think, be entitled to his day in court as in connection with other claims asserted by the United States against its citizens.

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Aside from these considerations, it is not within the power of the head of a department to enforce such demands by administrative action save with the acquiescence of the employee; and the damage might be great, affecting both willingness and ability to repay.

What is now suggested was, in effect, tried out during the earlier years of our national existence, but with judicial determinations of the liability. I refer to the following statement of the Solicitor for the Government in *Dennis v. United States*, 2 Ct. Cls. 210, as indicating the view entertained at that time.

"It is undoubtedly true that the claimant could not have proceeded against the master. Here it is alleged that the collision resulted from the failure of the government ship to have the required signals. The failure to do this must be regarded as negligence on the part of the master. For such negligence the master, and not the United States, is responsible, and for this the claimant, by the statutes to which reference has been made, has a complete remedy in the district courts."

Numerous suits were filed by private parties against officers and employees of the Government and the judgments obtained were sometimes in amounts so large as to threaten financial ruin and bankruptcy. Notwithstanding the view stated by the Solicitor in *Dennis v. United States*, the Congress repeatedly came to the relief of the erring officers and employees. Thus, in *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 124, the Supreme Court held Captain Murray, of the U.S. Frigate *Constellation*, personally liable for a tortious seizure, but the Congress made provision for his relief by the act of January 31, 1805, c. 12, 6 Stat. 56. Some of these suits were undoubtedly prosecuted in anticipation of such action by the Congress. In other cases private acts appropriated money for the direct relief of the injured private persons.

Since that time the Congress has by general legislation progressively assumed liability to persons sustaining injuries through negligence of officers and employees of the Government and in doing so has not made provision for the assertion of claims by the United States against the officers and employees causing the damage. A comprehensive review of the course of such legislation (including private acts) in collision cases appears in the Government's brief on reargument in *Boston Sand and Gravel Co. v. United States* (no. 15, October Term, 1928), 278 U.S. 41.

For the foregoing reasons it is my opinion that there is no authority in the Secretary of Agriculture to require an employee to reimburse the Government for a payment made in settlement of a claim under the act of December 28, 1922. Of course, the employee may be subjected to suitable discipline, including dismissal, if warranted.

Respectfully,

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